OCT 1 1968

JOHN F. DAVIS, CLERK

No. 629

IN THE

Supreme Court of the United States

OCTOBER, TERM, 1968

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IN THE MATTER OF THE
SUCCESSION OF
E. W. K. ANDRAU

PETITION BY BANK OF THE SOUTHWEST NATIONAL ASSOCIATION, HOUSTON, FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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October 8, 1968

FIDELITY PRINTING COMPANY, INC., HOUSTON

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• • •

May It Please the Court:

Petitioner, Bank of the Southwest National Association, Houston, prays that a writ of certiorari issue to the Supreme Court of the State of Louisiana to review its judgment entered July 16, 1968, on application for writs of certiorari and mandamus to review orders of the District Court of Pointe Coupee Parish and of the Court of Appeal, First Circuit, which orders denied Petitioner its venue right as a national bank to be sued only in the district, county and state in which it is located. United States Code, Title 12, Section 94.

OPINIONS BELOW

The judgment and opinion of the Supreme Court of Louisiana is printed in Appendix A, infra. The judgment and opinion of the Court of Appeal, First Circuit, State

of Louisiana, is printed in Appendix B, infra. The judgment and opinion of the Eighteenth Judicial District Court, Parish of Pointe Coupee, State of Louisiana, is printed in Appendix C, infra. None of the opinions below was officially reported.

JURISDICTION

The judgment of the Supreme Court of Louisiana was entered on July 16, 1968. (A, S 165).* The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), as interpreted by *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963).

QUESTIONS PRESENTED

A. Does a national bank located in Texas and which has never appointed a local agent for service in Louisiana, waive the protection of the National Bank Venue Act, Title 12, United States Code, Section 94, providing that a national bank must be sued at the place where it is located, by becoming ancillary executor of the Louisiana estate of a Texas decedent and thereafter filing an inventory of the estate, state inheritance tax returns in Louisiana and administering the Louisiana properties of such Texas resident's estate?

B. Is a "proceeding" seeking a personal judgment against a Texas national bank which is brought in the same style and number as the action in which the bank voluntarily appeared to be appointed ancillary execu-

* References to "(S)" and to "(D)" are to pages of the record in the Supreme Court of the State of Louisiana and of the record in the Eighteenth Judicial District Court, Parish of Pointe Coupee, State of Louisiana, respectively, as certified by the Clerks of those Courts. References to "(A)", "(B)" and "(C)" are to the Appendix.

tor in Louisiana for a Texas decedent an "action or proceeding" within the meaning of United States Code, Title 12, Section 94, entitling the Bank to its venue privilege?

C. Is such a personal action against a Texas national bank in Louisiana which is brought as part of a Louisiana Probate proceeding a "local action" within *Casey* v. *Adams*, 102 U.S. 66 (1880) and, if so, an exception to the exclusive venue rights of a national bank under United States Code, Title 12, Section 94?

STATUTE INVOLVED

The statute in issue in this case is 12 U.S.C. § 94, which provides:

> "Actions and *proceedings* against any association under this chapter may be had in any district or territorial court of the United States held within the district *in which such association may be established*, or in any state, county or municipal court *in the county or city in which said association is located* having jurisdiction in similar cases."*

STATEMENT OF THE CASE

1. The Parties.

Petitioner, Bank of the Southwest National Association, Houston ("the Bank") is a national banking corporation duly incorporated and authorized to transact business as a national bank under the Acts of Congress. Under its charter it is established and located in Houston, Harris County, Texas. (D 387). In 1951, Dr. E. W. K. Andrau, while domiciled in Texas, died testate leaving a wife and three children. Dr. Andrau left his share of community

*Emphasis ours throughout, unless otherwise noted.

property and all of his separate property in trust for his three children, who are also residents of Texas. By his will, Dr. Andrau named the Bank (then Second National Bank of Houston) independent executor of his estate and also testamentary trustee of the testamentary trusts for his children. (D 8, 19).

The Bank in 1951 opened a probate proceeding in regard to the estate of Dr. Andrau in Harris County, Texas, and qualified as independent executor. (D 2, 3). Later, in 1952, it opened an ancillary succession (probate) proceeding in Pointe Coupee Parish, Louisiana, and was appointed Louisiana executor of the Succession of E. W. K. Andrau in June, 1952. (D 26, 27). Petitioner, however, never appointed an agent for service of process in connection with the ancillary succession proceeding in Louisiana and has never qualified to do business in Louisiana. (D 374, 375).

Respondents are the three children of Dr. E. W. K. Andrau, Mrs. Helen Antoinette Andrau Seigler, William E. Andrau, and Mrs. Barbara Andrau Peck, all residents of Texas.

2. The Actions.

On February 27, 1968, an action was filed in the Texas District Court in Houston, Harris County, Texas (where the Bank is located) by the three Andrau heirs, seeking judgment against the Bank for alleged exeessive fees and alleged mismanagement of the Andrau estate. (D 435).

On February 28, 1968, the following day, Mrs. Helene Antoinette Andrau Siegler, William E. Andrau and Mrs. Barbara Andrau Peck (the three Andrau children) filed an action in Louisiana to recover penalties in the sum of millions of dollars from the Bank. (D 300, 306). This action was denominated a "Motion for Rule to Show Cause" and was filed in the same style and number on the docket

of the Eighteenth Judicial Court, Parish of Pointe Coupee, State of Louisiana, as the original succession proceeding. Service of citation on the Bank was made upon the Louisiana attorney who had last appeared for the Bank in the succession. (D 327). Among other things, such new proceeding complained of the Bank's alleged mismanagement of the Andrau estate by failing to file accountings in the Louisiana succession proceeding and failure to deposit funds of the succession estate in banks in Pointe Coupee Parish rather than with itself in Houston, Texas.

The Bank appeared and answered the Texas suit and has filed a cross-action therein.

The Bank also appeared in the Louisiana proceedings *solely for the purpose of contesting venue* and filed its Declinatory Exception: Lack of Jurisdiction of Presence of Defendant, the proper procedure for attacking venue in Louisiana. (D 357, S 23). The basis for its venue attack was that it is a national bank and that under a federal statute, 12 U.S.C. § 94, as interpreted by the United States Supreme Court, actions and proceedings against it must be brought in the district, county and state in which it is established, which is only in Houston, Harris County, Texas.

3. The Orders in Question.

The Eighteenth Judicial District Court, Parish of Pointe Coupee, State of Louisiana, on May 27, 1968, entered an order overruling the declinatory exception. (D 359, S 13, C).

The Bank thereafter filed with the Court of Appeal, First Circuit, State of Louisiana, pursuant to Article 7, § 29 of the Constitution of Louisiana, as amended in 1958, a petition for writ of certiorari and mandamus for the Court of Appeal to direct the trial court to sustain its declinatory

exception, this being proper procedure under Louisiana law for review of the trial court's ruling, since Louisiana law does not provide for direct appeal from venue rulings. The Court of Appeal by order dated June 20, 1968, refused the writs sought by the Bank with the notation that the ruling of the trial court was correct. (S 77, B).

The Bank then filed with the Supreme Court, State of Louisiana, pursuant to Article 7, § 29, of the Constitution of Louisiana, as amended in 1958, and Rule 12 of the Louisiana Supreme Court Rules, a petition for writ of certiorari and mandamus for the Supreme Court of Louisiana to direct the trial court to sustain the declinatory exception filed by petitioner. (S 2). That Court, by order dated July 16, 1968, also refused the writs sought by the Bank, again with the holding that the ruling of the trial court was correct. (S 165, A).

The Bank now files this petition for writ of certiorari, to review the Louisiana Supreme Court's venue ruling, under *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555 (1963), in which the Supreme Court clearly held that "final judgments or decrees" for Supreme Court review under 28 U.S.C. § 1257 included venue rulings of a state court since they are *"a separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action."* (371 U.S. 555, at page 558).

REASONS WHY THE WRIT SHOULD BE GRANTED

Decisions with respect to venue of national banks have frequently been reviewed by this Honorable Court, and the opinions of the Supreme Court show that the venue privilege of national banks has been jealously guarded by this Court. The decision of the Louisiana Supreme Court in this case raises important and far-reaching questions con-

cerning (i) whether conduct of a national bank *prior to suit* can waive the statutory privilege; (ii) if so, does acting as executor and trustee in another state constitute waiver; (iii) the proper construction of 12 U.S.C. § 94 as applying not only to "actions" *but to proceedings* in an already pending action and (iv) whether "tieing" a state court proceeding seeking damages and penalties to an existing probate action makes the entire suit "local" in character and thus an exception to the federal venue privilege.

1.

The lower federal courts and some state courts have heretofore held that a national bank's pre-suit conduct may constitute a waiver (e.g., *Buffum* v. *Chase Nat'l Bank*, 192 F2d 58 (7th Cir. 1951); *Litchenfels* v. *North Carolina Nat'l Bank*, 260 N.C. 146, 132 S.E.2d 360 (1963)); the United States Supreme Court has never gone so far, holding only that a failure to raise the venue privilege until after a trial on the merits constitutes waiver. *First National Bank of Charlotte* v. *Morgan*, 132 U.S. 141 (1889). As the Supreme Court there held:

> ". . . But, without indulging in conjecture as to the object of the exemption in question, it is sufficient that it was granted by Congress, and, *if it had been claimed by the defendant when appearing in the Superior Court of Cleveland County, must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State and in the latter tribunal, for the first time, claimed the immunity granted to it by Congress. This was too late.*"

The present case furthermore presents squarely the question left open in *Michigan Nat'l Bank* v. *Robertson*,

372 U.S. 591 (1963), (Whether a national bank's pre-suit conduct can waive its venue privilege). In *Robertson*, this Honorable Court remanded the case to the Nebraska Supreme Court for that Court to consider, in the first instance, that question. Since on remand the Nebraska Supreme Court held that the Bank's pre-suit conduct did *not* constitute a waiver of the venue privilege (*Hills* v. *Burnett*, 175 Neb. 871, 125 N.W.2d 66 (1963)), the question of pre-suit conduct as waiver did not again reach the Supreme Court in the *Robertson* case.

The same question of whether pre-suit conduct of a national bank can constitute a waiver of its venue privilege was also not answered by this Court in *Bank of America* v. *Whitney Central Nat'l Bank*, 261 U.S. 171 (1923), decided subsequently to *Morgan*, where the Court observed:

> "Whether a national bank could *under any circumstances*, be subjected, without its consent, to suit in a state or district, other than that in which it is authorized to locate its banking house, we have no occasion to consider in this case."

That this question (pre-suit conduct as waiver) should now be squarely answered is shown by *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963), where this Court (just a few months prior to *Robertson*) stated:

> "Congress consented to have national banks subject to suit *and we believe Congress intended that in those courts alone* [*those provided by the federal national bank venue statute*] *could a national bank be sued against its will.*"

That a waiver of venue requires *actual consent* and not implied consent from activity in the forum state should perhaps follow from this Court's opinions in *Olberding* v. *Illinois Central Railroad Co.*, 346 U.S. 338 (1953), and *Neirbo* v. *Bethlehem Ship Building Corp.*, 308 U.S. 166 (1939).

In any event because of the uncertainty of the correct interpretation of the *Robertson* case, and because of the clear conflict between the language in the *Morgan* case that only if the venue privilege *is not claimed* (after suit is filed) does a waiver occur and the holdings of lower courts that waiver may occur by pre-suit activity, writ of certiorari should be granted in order finally to put at rest the doubtful state of the law on this question.

This Court and the Federal Courts of Appeal have clearly held that the Congressional privilege granted banks under 12 U.S.C. § 94 is an important and valuable right to be given a mandatory and not a permissive interpretation and one which cannot be superseded by contrary state venue provisions, *Mercantile Nat'l Bank* v. *Langdeau,* 371 U.S. 555 (1963), or even by special venue provisions of the Federal Securities Acts, *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.,* 394 F.2d 300 (2nd Cir. 1968). Moreover, national banks are quasi — public institutions, national in character, subject to the control of Congress and are not to be interfered with by *state* legislative or *judicial action* except so far as the lawmaking power of the United States Government may permit. *Mercantile Nat'l Bank* v. *Langdeau,* supra. In fact, because of their national, quasi — public character, this Court has recently held that national banks are immune from state taxation in certain areas. *First Agricultural Nat'l Bank* v. *State Tax Commission,* ..... U.S. ....., 20 L.Ed.2d 1138. (June 17, 1968).

Therefore, because of the express legislative and judicial policy of carefully protecting federally granted rights to national banks, it is important that this Court resolve the question of pre-suit waiver of venue rights by a national bank where the bank has timely claimed its venue privilege. This is particularly important because the rights

and privileges provided by 12 U.S.C. § 94 may subsist in name only if State courts are allowed to decide, as the Louisiana Courts here have decided, that activity by a national bank in a forum prior to suit constitutes a waiver of venue.

2.

Even if the venue provisions of 12 U.S.C. § 94 can be waived by a national bank by activity prior to suit, the further important question remains whether the venue privilege in an action or proceeding seeking a *personal judgment* against a national bank is waived simply by virtue of the bank having instituted an ancillary succession (probate) proceeding in another state and becoming executor therein, but not appointing an agent for service of process in the second state. This question is of great importance to national banks who with great frequency are called upon to act as executors and trustees of estates with property located in other states.

There is a clear conflict on this question between a Court of Appeals case and two state Supreme Court cases. Furthermore, the two state court cases appear to be in conflict with the principles established by this Court in *Olberding* v. *Illinois Central Railroad Co.*, 346 U.S. 338 (1953), and particularly as these principles are applied by lower federal courts in the probate area.

In *Doyle* v. *Loring*, 107 F.2d 337 (6th Cir. 1939), cert. den'd 309 U.S. 686 (1940), suit was brought seeking a personal judgment for mismanagement against a non-resident administratrix who had come into the forum state and filed probate proceedings and secured letters testamentary therein. The Court held that by such conduct the administratrix did not waive her venue privilege. The Court held:

> "The important question is that of venue. The statute, title 28, Sec. 112(a) . . . provides that where the action is between citizens of different States, 'suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' The suit was brought in the Western District of Tennessee and no plaintiff was a resident of that district. According to the averments of the bill, Mrs. Loring [nonresident administratrix] was not a resident of the Western District. *When sued there it was her privilege seasonably to contest the jurisdiction or to waive the question . . . She took the former course* and on May 16, 1938, not intending to submit herself to the jurisdiction of the court, she appeared specially for the sole purpose of questioning the jurisdiction over her person and entered two motions, one as an individual and the other as administratrix, to dismiss the action upon the ground that she was, at the time the suit was brought, a citizen and resident of Texas. Upon the hearing of these motions it was stipulated that at the time the bill was filed she was and 'still is' a resident and citizen of Texas. *Ordinarily this stipulation would terminate the controversy in favor of Mrs. Loring individually and as administratrix, for, upon the question of jurisdiction her citizenship as administratrix was identical with that of her personal citizenship. . . .*"
>
> (The Court then held that a state statute providing for substituted service on an administrator absent from the state did not deprive the administratrix of her federal venue privilege.)

Certiorari was denied by this Court (309 U.S. 686). *Doyle*, thus is a clear holding by the Sixth Circuit that a federal venue privilege is not waived by virtue of a nonresident filing a probate proceeding in the forum state and thereafter acting as administrator of an estate therein.

However, subsequent to the *Doyle* case, and in apparent conflict with it, is *Lichtenfels* v. *North Carolina Nat'l Bank,* 260 N.C. 146, 132 S.E.2d 360 (1963). In *Lichtenfels,* suit was brought against an administrator national bank in a forum where probate was pending but which was in a different county than where the bank was located. The North Carolina Supreme Court held that the bank by filing the probate proceeding in the second county and its administering of the estate in that county had waived its venue privilege. Certiorari was not sought in *Lichtenfels.*

Moreover, the Florida Supreme Court in *County of Okeechobee* v. *Florida Nat'l Bank of Jacksonville,* 112 Fla. 309, 150 So. 124 (1933), had earlier held that a national bank waived venue by entering into a trust agreement requiring of the bank fiduciary duties relating to trust funds located in the county in which suit was brought.

In addition to the clear conflict between the state court cases of *Lichtenfels* and *County of Okeechobee* on the one hand and the Sixth Circuit *Doyle* case on the other hand, the two state court cases are in apparent conflict with the principles established by this Court in *Olberding* v. *Illinois Central Railroad Co.,* 346 U.S. 338 (1963), and cases following *Olberding.*

In *Olberding* this Court resolved a question which had arisen as a result of its decision in *Neirbo Co.* v. *Bethlehem Shipbuilding Corp.,* 308 U.S. 165 (1939). In *Neirbo* a Delaware corporation, which had under a state statute appointed an agent for process in New York pursuant to its doing business there, was sued by a nonresident of New York in a federal district court in New York, and this Court held that the venue requirements of the federal venue statute had been waived by virtue of the defendant *having actually designated an agent for process in New York.*

After *Neirbo,* the question arose whether a nonresident defendant who had not *actually designated* an agent for process in a state waived its venue right or privilege on the ground that an agent was automatically appointed for it by operation of law where a state statute so provided.

This question was resolved in *Olberding* v. *Illinois Central Railroad Co.,* (346 U.S. 338), where plaintiff, a nonresident of Kentucky, brought suit in Kentucky against defendant Olberding, also a nonresident of Kentucky, for damages occuring when defendant's truck while on temporary business in Kentucky collided with an overpass of the plaintiff railroad causing a subsequent derailment. The defendant was served with process by serving the Secretary of State of Kentucky according to the Kentucky nonresident motorist statute. The courts below held that the defendant had waived the venue privilege because he had consented to be sued in Kentucky by virtue of his truck being driven on the highways of Kentucky, which state had a statute holding nonresident motorists amenable to service for accidents caused by their negligent operations within the state.

However, this Court held that a waiver had not occurred and that *actual rather than implied consent by virtue of activity* in the state was necessary for a waiver of venue rights. The Court distinguished *Neirbo* on the ground that the actual appointment of an agent for process in *Neirbo* constituted the *actual consent* necessary for waiver.

Lower federal cases decided after *Neirbo* and *Olberding,* but adopting their principles, have held that the filing of probate proceedings in a second state does not constitute a waiver by a nonresident of venue privilege where he has not appointed an agent for process in the second state. *Davis* v. *Smith,* 126 F. Supp. 497 (E.D. Pa. 1954), aff'd 253 F.2d 286 (3rd Cir. 1958); *Leonard* v. *Wharton,* 268 F.

Supp. 715 (D.C. Md. 1967); *Friele* v. *Schaffer*, 177 F. Supp. 654 (D.C. Mont. 1959).

Not only does it appear that the state cases of *Lichtenfels* v. *North Carolina Nat'l Bank*, 132 S.E. 2d 360, and *County of Okeechobee* v. *Florida Nat'l Bank*, 150 So. 124, are in conflict with *Olberding*, 346 U.S. 338, and the cases following it, but this Court in *Mercantile Nat'l Bank* v. *Langdeau*, 371 U.S. 555, in footnote 13 of its opinion seemingly equated the holding in the *County of Okeechobee* case with the holdings of other state court cases which stated that the venue provisions of 12 U.S.C. § 94 are permissive, rather than mandatory — holdings which were clearly refuted and disapproved in *Langdeau*.

Petitioner submits that the tremendous importance to national banks (who with great frequency are called upon to exercise trustee and executor functions in counties and states outside of their location) in having resolved the conflict between the cases above discussed so that they will clearly know whether they can be subjected to suits seeking to impose personal judgments on them in counties and states outside of their location where they exercise fiduciary functions, is a compelling reason for this Court to grant certiorari.

3.

Whether a proceeding filed in the same style and number as a long-pending Louisiana succession (probate) proceeding, is a "proceeding" within the meaning of 12 U.S.C. § 94 providing that "actions and proceedings" against national banks are to be brought where the banks are located, is one of the first impression. Since the statute uses both the words "actions" and "proceedings" it is obvious that Congress intended each to have a different meaning, but neither this Court nor apparently any other has defined the term "proceedings" as used in the statute. This open

question should now be answered so that guidelines are available to other courts in the future.

This Court in *Bowers* v. *New York & A. Lighterage Co.*, 273 U.S. 346 (1927) did grant writ of certiorari to review the question of whether the word "proceeding" used in § 250(d) of the Revenue Act of 1921, providing that no "suit *or proceeding*" for the collection of any unpaid income or excess profits taxes shall be begun after the expiration of five years after the date a return was filed, had reference only to a judicial proceeding or whether it also barred collection of taxes by distraint, and this Court held that the word had a meaning broader than "suit" and did bar collection by distraint.

Moreover in *Ingravallo* v. *Pool Shipping Co.*, 247 F.Supp. 394 (E.D. N.Y. 1965), it was stated:

> ". . . In Volume 34, Words and Phrases, page 152, the word 'proceedings' is defined as, 'all the *steps* or *measures* adopted in the prosecution or defense of an action. Slatter v. United States [9 Cir.], 66 F.2d 819, 822' . . ."

Furthermore, in *Gonzales* v. *Gonzales*, 240 Mass. 159, 133 N.E. 855 (1921), a statute had been passed providing for a direct appeal from the Massachusetts probate court to the Supreme Judicial Court of Massachusetts in any "proceeding" which was commenced after the date of the enactment. In the cited case, a will had been probated, a number assigned by the probate court and letters testamentary issued to an administrator before the date of the enactment of the statute in question. Thereafter, the administrator filed a petition *in the same pending action giving it the same style and number theretofore assigned and seeking approval of his accounts*. This "proceeding" was one requiring notice and service upon interested parties — just

as the relevant Louisiana statute requires notice and service for the Motion for Rule to Show Cause and the Petition for Notice of Filing Tableau of Distribution filed by the Andrau plaintiffs.

In *Gonzales* the probate court entered an order denying approval of certain items of the account of the administrator. The administrator thereupon sought to appeal to the County Court of Suffolk County, Massachusetts. His attempted appeal was dismissed on the ground that the newly enacted statute required an appeal not to the County Court but to Massachusetts' Supreme Judicial Court. The administrator thereupon appealed the order of dismissal to the Supreme Judicial Court of Massachusetts. Accordingly, that court had before it the exact question presented in this case, viz: Is a new "proceeding" in an old "action" governed by a statute dealing with "proceedings" *commenced after the date of the statute?* The Supreme Judicial Court of Massachusetts held that the petition for approval of the account was a "proceeding" coming under the new statute and, accordingly, dismissed the appeal. In disposing of this question, the Court held:

> ". . . In the consideration of the legislative intent in the use of the word 'proceeding' in St. 1919, c. 274, §§ 1, 10, we set to one side as not being 'any proceeding begun after this act takes effect' *the incidental procedural orders and decrees whenever made, which necessarily must be made in every probate petition which looks to a final decree. As regards substantial proceedings in the probate court under petition and notice to adversary interests after the appointment of an administrator or executor, we are of opinion the Legislature intended the words 'any proceeding' should mean any indpendent steps taken in the settlement of the estate that cannot be taken and determined by the court except upon a petition and hearing thereon, which shall be independent of the petition upon which the original letters of administration issued.*"

The Bank submits that the correct criterion to be used in defining the word "proceedings" is that set forth in the *Gonzales* case, supra, and that set forth in *State* v. *Wright,* 186 Wash. 194, 57 P.2d 323 (1936), in which application for writ of mandamus was made to compel a judge to grant a change of venue on a petition to vacate a decree adverse to relator. Washington had a statute which provided that a change of venue shall occur in "any action or proceeding" wherein the judge is prejudiced. The question for decision in the case was whether a petition to vacate a judgment filed in the same case where the judgment was rendered constituted an "action or proceeding" within the meaning of the statute providing for a change of venue for prejudice.

The Washington Supreme Court held that a proceeding on a petition to vacate a judgment did constitute a "proceeding" within the meaning of the statute, and in support of its holding quoted from the earlier Washington Supreme Court case of *Cooper* v. *Cooper,* 83 Wash. 85, 145 Pac. 66 (1914), in part as follows:

> " 'It will be noted that this proceeding by petition is in its nature a new and independent proceeding in which the adverse party is brought into court as upon original process by service of a notice in the nature of a summons as in an original action. Clearly this proceeding by petition is intended as a statutory substitute for a bill of equity to set aside a judgment for certain causes, if brought within the year after its rendition. For every practical purpose such a proceeding is in its nature a new and independent proceeding involving issues and requiring evidence which may be wholly independent of the issues and evidence in the original action.
>
> • • •

> *"'It seems to us that a proceeding which is instituted with all the formality of an original action and conducted throughout in the same manner as an original action and in which the parties, regardless of their designation in the original action, occupy the relation of plaintiff and defendant according to the issues presented by the petition, and in which those issues may take all the range of an independent bill in equity for relief against a judgment, is in its very nature a new proceeding, and hence falls within the purview of the act of 1911 relating to the disqualification of judges of the superior court, for prejudice.'"*

Based on the criterion set forth in the preceding cases, the proceeding against the Bank in this case insofar as it seeks an *in personam* judgment for failure to deposit money in a Louisiana bank and for failure to file an accounting is certainly a "proceeding" within the meaning of 12 U.S.C. § 94.

Actions against Louisiana executors to invoke penalties for failure to account and to deposit funds are not required to be brought in the succession proceeding at all and may be brought as independent suits. *Congregation of St. Mary of Mt. Carmel Church* v. *Farrelly*, 34 La. Ann. 533 (1882); *Succession of E. H. Dickson* v. *Succession of D. F. Dickson*, 23 La. Ann. 583, (1871). Even when such actions are brought in the succession proceeding, they are in the nature of an independent suit and certainly may involve issues and require evidence wholly independent of the issues and evidence in the succession proceeding. Moreover, such proceedings when brought in the succession are instituted by a Motion for Rule to Show Cause, which under Louisiana law requires an appearance on the part of the defendant and service of the motion upon the defendant before the proceedings can be prosecuted, which service cannot be satisfied by simply *mailing a copy* of the Motion

to defendant's counsel of record in the succession proceeding. LSA-C.C.P., Arts. 1312, 1313, 1314; *Normand Co.* v. *Abraham*, 176 So.2d 178 (La. Ct. App. 1965). Therefore, it would certainly appear that the claims seeking a personal judgment against the Bank are "proceedings" to which the provisions of the 12 U.S.C. § 94 apply.

However, since there are no decisions by this Court interpreting the word "proceedings" contained in 12 U.S.C. § 94, writ of certiorari should be granted to resolve whether the word "proceedings" simply means, despite the presence of the word "actions" in the statute, a new lawsuit, or whether it also includes a new proceeding instituted in a pending suit.

4.

Whether an action or proceeding against a national bank for a personal judgment for many millions of dollars is a "local action" where the suit is not only for damages but also for an accounting and distribution of the estate is also a question which has not previously been presented to this Court.

This question is also of great importance to national banks exercising executor or trustee functions in counties where they are not located. This Court in establishing the "local action" exception to the venue privilege of 12 U.S.C. § 94, in *Casey* v. *Adams*, 102 U.S. 66 (1880), stated as follows:

> "... *Local actions are in the nature of suits in rem*, and are to be prosecuted when the thing on which they are founded is situated.
>
> " • • •
>
> "The proceeding in this case was local in nature. ... *no personal claim was made against the bank.* Nothing was wanted except to 'class the privilege' of

> the bank on the property seized 'according to its rank.'"

However, it has been urged by Respondents in the courts below that since this proceeding involves probate matters, including removal of the Bank as executor and distribution of the estate, it is a local action.

Doyle v. *Loring*, 107 F.2d 337 (6th Cir. 1939), cert. den'd 309 U.S. 686 (1940), while not discussing the local action question, impliedly held that actions against nonresident executors resulting from alleged wrongs in connection with their fiduciary duties are *not* local actions, for that Court enforced the venue privilege and did not allow the prosecution of the suit in the forum state where the fiduciary duties were to be performed.

This Court has held that actions seeking *in personam* liability against an executor or other fiduciary are not local, (in the sense of being the exclusive province of the state probate court) and that such actions may be brought in *federal* court. By necessary implication, such decisions seemingly dispose of the argument in the instant case that the *in personam* claims are local because of their probate connection.

Thus, in *Waterman* v. *Canal-Louisiana Bank & Trust Co.*, 215 U.S. 33 (1909), also a case arising in Louisiana, suit was brought in federal court by an heir against, among others, the executor of the estate of a testatrix who died in Louisiana seeking (1) the setting aside of a certain legacy in the testatrix's will, (2) a determination that certain other legatees had renounced and abandoned their interests in the legacy and in the residue of the estate, (3) an award to plaintiff of the legacy sought to be set aside and the residue of the estate, and (4) a decree requiring the executor to account for the estate of the testatrix.

This Court held that a federal court has no jurisdiction over proceedings *purely of a probate character for they were local state matters,* but it also held that a federal court did have jurisdiction to determine and award binding *in personam* decrees. This Court then held that the accounting issue was a purely probate matter and thus not cognizable in a federal court, but that the federal court did have jurisdiction to determine the right of the plaintiff to the attacked legacy and the residue of the estate *and to enter judgment against the defendant executor binding it personally for the amount of the legacy and the residue.*

In the subsequent case of *Commonwealth Trust Co.* v. *Bradford,* 297 U.S. 613 (1935), a national bank receiver who had voluntarily appeared in the Orphans' Court (probate) of Pennsylvania to relinquish control of a trust fund to a successor trustee, thereafter filed suit in a federal district court seeking judgment in that court that the bank would be entitled to share in the trust fund. On motion to dismiss the district court held that the Orphans' Court *did not acquire exclusive jurisdiction of all matters concerning the fund simply because it had jurisdiction of certain matters such as "accounting" and "distribution" thereof.*

Both the Court of Appeals and this Court affirmed. This Court, in relying on the theory set forth in the *Waterman* case, stated:

> ". . . But they (petitioners) maintain the cause stated by the bill was not one cognizable in equity, since the subject matter was a fund held by a trustee under appointment of the State Court against which no adjudication was possible in the absence of an accounting — the necessity of this was inherent in the cause as presented. Also, that to enforce the remedy sought would necessarily interfere with possession and con-

trol of the res in the custody of the Orphans' Court. And further that under the rule of comity . . . the trial court should have dismissed the proceedings.

"• • •

"The trust here involved was created by the Bank's voluntary action, not by the Orphans' Court. *Whatever control the latter possessed resulted solely from appointment of the successor trustee and, for present purposes, did not materially differ from that exercised by probate courts over such fiduciaries as guardians, administrators, executors, etc. The jurisdiction of Federal Courts to entertain suits against the latter is clear, when instituted in order to determine the validity of claims against the estate or claimants' interest therein. Such proceedings are not in rem; they seek only to establish rights; judgments therein do not deal with the property and order distribution; they adjudicate questions which precede distribution* . . . Waterman v. Canal-Louisiana Bank & T. Co., 215 U.S. 33, 43. . . . Property in its (the trustee's) possession is not in custodia legis as in case of receivers. . . ."

Therefore, the mere fact that certain claims have a probate connection does not make them local actions.

This same position or theory was recognized in *Booth* v. *Merchants Nat'l Bank of Brownsville,* 100 F.2d 478 (5th Cir. 1938), which involved the removal of a case from an appellate state probate court to a federal district court where part of the relief sought was an *in personam* judgment against an executor for mismanagement of the estate. There the Fifth Circuit held that while certain aspects of the case were purely of a local, probate character, the claim against the executor bank for mismanagement was an *in personam* or *inter partes* action which was not of such a local probate character as to preclude jurisdiction over it by a federal court.

Clearly, while courts have held that certain matters such as a request for an accounting are of a purely probate character and thus local actions, they have also held that actions seeking enforcement of *in personam* rights or imposition of *in personam* liability are not of a purely probate character and may therefore be brought in federal court, which does not have jurisdiction over actions of a purely probate character. Consequently, actions or proceedings seeking to impose personal liability should not, because of their probate connection, be considered local actions.

However, even though decisions in other areas readily demonstrate by analogy that such actions are not local, petitioner could not find a decision determining whether *in personam* actions against executors or other fiduciaries are local actions within the *Casey* v. *Adams* exception to the venue provisions of 12 U.S.C. § 94. It is important that such a question now be considered and resolved else national banks could be held subject to suits seeking *in personam* liability in courts outside of the location of the national banks on the ground that by being linked with purely probate matters, such actions are local.

CONCLUSION

The trial court did not set forth its reasons for denying petitioner's declinatory exceptions seeking a change of venue. Moreover, neither the Court of Appeal nor the Supreme Court of Louisiana set forth the reasons for their opinions and judgments that the action of the trial court was correct. Therefore, because of the uncertainty of the grounds for these holdings as well as for all of the other reasons set forth herein, this petition for writ of

certiorari should be granted on all questions presented herein.

Respectfully submitted,

.....
L. Keith Simmer

.....
James C. Slaughter

Attorneys for Petitioner,
BANK OF THE SOUTHWEST
NATIONAL ASSOCIATION,
HOUSTON.

Of Counsel:

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October 8, 1968

CERTIFICATE OF SERVICE

In accordance with Rule 33 of the Supreme Court Rules, I hereby certify that copies of the foregoing Petition for Writ of Certiorari were duly served upon Claude R. Miller, Esq., Park Cities National Bank Building, Dallas, Texas, and Charles H. Dameron, Esq., of Durrett, Hardin, Hunter, Dameron & Fritchie, 408 Louisiana National Bank Building, Baton Rouge, Louisiana, attorneys of record for movants in the proceedings on the motion for rule to show cause filed in the Succession of E. W. K. Andrau, No. 3972, Eighteenth Judicial District Court, Parish of Pointe Coupee, State of Louisiana, by depositing same in the United States Mail, air mail, certified mail, return receipt requested, with required postage prepaid, on the ..... day of October, 1968.

.....

L. Keith Simmer

APPENDIX A

OPINION OF SUPREME COURT OF LOUISIANA

SUPREME COURT OF LOUISIANA

New Orleans, 70112

No. 49,359 July 16, 1968

IN THE MATTER OF THE
SUCCESSION OF E. W. K. ANDRAU

In re: Bank of the Southwest National Association, Houston, applying for writs of certiorari and mandamus

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Writ refused. The ruling of the trial court is correct.

/s/ MEB

/s/ JBF

/s/ JWS

HAMLIN, J., concurs; but is of the view that applicant's remedy may be by motion to stay the Louisiana proceedings. Cf. Transamerica Ins. Co. et al vs. Whitney National Bank of New Orleans, ... La. ..... 206 So. 2, 500.

APPENDIX B

OPINION OF COURT OF APPEAL FOR THE FIRST CIRCUIT STATE OF LOUISIANA

COURT OF APPEAL, FIRST CIRCUIT STATE OF LOUISIANA

IN THE MATTER OF THE SUCCESSION OF E. W. K. ANDRAU — No. 7573

In Re: Bank of the Southwest National Association, Houston applying for writs of Certiorari and Mandamus to the Eighteenth Judicial District Court, Parish of Pointe Coupee, Honorable Daniel P. Kimball, Judge, presiding.

Writs refused: The ruling of the trial court is correct.

/s/ H. R. Reid

/s/ Julian E. Bailes

Filed: June 20, 1968
John E. Miller, Clerk

APPENDIX C

OPINION OF EIGHTEENTH JUDICIAL DISTRICT COURT PARISH OF POINTE COUPEE STATE OF LOUISIANA

EIGHTEENTH JUDICIAL DISTRICT COURT PARISH OF POINTE COUPEE STATE OF LOUISIANA

SUCCESSION OF	NUMBER 3972
E. W. K ANDRAU	JUDGMENT OVERRULING DECLINATORY EXCEPTION OF LACK OF JURISDICTION

This matter came up regularly for hearing on the Declinatory Exception of lack of jurisdiction filed on behalf of Bank of the Southwest National Association, Houston. There were present for Exceptor Messrs. L. Keith Simmer, Victor A. Sachse, Sr., J. Thomas Jewell and Harry Sachse and for plaintiffs in rule, Messrs. Claude R. Miller and Charles H. Dameron.

When, after considering the pleadings, the evidence and the arguments and written briefs of counsel, the Court being of the opinion that the law and the evidence are in favor thereof, for the reasons this day orally assigned:

IT IS ORDERED, ADJUDGED AND DECREED that the Declinatory Exception of lack of jurisdiction filed herein by Bank of the Southwest National Association, Houston, be, and the same is hereby overruled.

JUDGMENT READ, RENDERED AND SIGNED in Open Court at New Roads, Louisiana, this 27 day of May, 1968.

/s/ DANIEL P. KIMBALL
JUDGE, EIGHTEENTH JUDICIAL
DISTRICT COURT